Order 96-5-12

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

SERVED: MAY 9, 1996

Issued by the Department of Transportation
on the 9th day of May, 1996

Joint Application of **UNITED AIR LINES, INC.** **and** **DEUTSCHE LUFTHANSA, A.G.** **d/b/a** **LUFTHANSA GERMAN AIRLINES** **for approval of and Antitrust Immunity for an Alliance Expansion Agreement pursuant to** **49 U.S.C. §§ 41308 and 41309**	**Docket OST-96-1116**

ORDER TO SHOW CAUSE

United Air Lines, Inc. ("United"), and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines ("Lufthansa") have applied for approval and antitrust immunity under 49 U.S.C. §§ 41308 and 41309, for an Alliance Expansion Agreement ("the Alliance Agreement"),[1] whereby the joint applicants will plan and coordinate service over their respective route networks as if there had been an operational merger between the two airlines.

We have tentatively determined to grant approval of and antitrust immunity for the Alliance Agreement between United and Lufthansa. We have, however, tentatively found it appropriate to condition our approval as more fully explained below. We will require the applicants to (1) exclude certain matters relating to fares and capacity for particular categories of U.S. point of sale local passengers on the Chicago-Frankfurt and Washington, D.C.-Frankfurt routes, as agreed between the applicants and the Department of Justice

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1 The term "Alliance Expansion Agreement" as used herein means the following agreements between the joint applicants: (1) the agreement entered into on January 9, 1996; which incorporates their agreement dated October 3, 1993, which remains in full force and effect; (2) any implementing agreements that the joint applicants conclude pursuant to the January 9, 1996, agreement to develop and carry out the United and Lufthansa alliance; and (3) any subsequent agreement(s) or transaction(s) by the joint applicants pursuant to the foregoing agreements.

(DOJ);[2] (2) withdraw from all International Air Transport Association (IATA) tariff conference activities affecting through prices between the United States and Germany and for other markets described below; (3) file all subsidiary and or subsequent agreement(s) with the Department for prior approval; and (4) resubmit for renewal their various styled alliance agreement(s) in five years. We also tentatively find it in the public interest to direct Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) data for all passengers to and from the United States (similar to the O&D Survey data reported by United). We are providing the joint applicants and other interested parties the opportunity to comment on our tentative findings in this order.

We tentatively find that our action in this matter will advance important public benefits. Final approval would permit the two airlines to operate more efficiently, provide better service to the U.S. traveling and shipping public, and allow United to compete more effectively with other global alliances. This is consistent with our policy of facilitating competition among emerging multinational airline networks, where those networks will lead to lower costs and enhanced service for U.S. and international consumers. We also fully recognize that the trend toward expanding international airline networks is an inevitable response to the underlying network economics of the airline industry and our action here will allow our airlines to become early and significant players in the globalization of the airline industry.

Our action in this order is consistent with our approval and grant of antitrust immunity for the alliance between Northwest Airlines and KLM.[3] Northwest and KLM have integrated their operations so that they operate very much like a single airline. Our experience with that alliance has demonstrated that such alliances between U.S. and foreign airlines can substantially benefit consumers. The alliance between Northwest and KLM has enabled the two airlines to operate more efficiently, and to provide integrated service in many more markets than either partner could serve individually.[4] We expect that the alliance between United and Lufthansa will provide comparable benefits to consumers. Our assessment of the competitive and public interest factors for the United-Lufthansa alliance is similar to our judgment on these issues for the Northwest-KLM alliance.

In granting airlines immunity from the operation of our antitrust laws so that they may form efficient alliances, however, we tentatively do not believe it to be in the public interest at the same time to permit alliances to participate in certain price-related coordination that

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2 The Department will review this condition within eighteen months to determine whether it should be discontinued or modified. (*See* Appendix A, p.3).

3 Orders 93-1-11 and 92-11-27.

4 *International Aviation: Airline Alliances Produce Benefits, but Effect on Competition is Uncertain* (GAO/RCED-95-99, April 6, 1995); and *A Study of International Airline Code Sharing*, Gellman Research Associates, Inc., December 1994.

is now immunized within IATA tariff coordination. This "dual" immunity would raise unacceptable risks to competition and consumers. We therefore are proposing to condition our approval and grant of antitrust immunity in this case by requiring the applicants to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department.

I. Background

A. The Open Skies Agreement with the Federal Republic of Germany

On February 29, 1996, delegations of the Governments of the United States and the Federal Republic of Germany reached an *ad referendum* agreement regarding a new Open Skies aviation relationship between the two countries.[5] The new accord allows any U.S. carriers to serve any point in Germany (and open intermediate and beyond rights) from any point in the United States and allows any German carrier to do the same. As the earlier U.S.-Netherlands Agreement has demonstrated, Open Skies aviation should also encourage more competitive service in the U.S.-Germany marketplace. Since the price and quality of U.S.-Germany airline service will be disciplined by market forces, not restrictive agreements, U.S. travelers will have an incentive to travel through Germany to points beyond, in competition with services offered through other European gateways.

B. The Joint Applicants' Operational Relationships

The joint applicants operate code-sharing services in the following 12 nonstop and single-plane markets:

Atlanta-Frankfurt: Operated daily by Lufthansa (nonstop service).

Boston-Frankfurt: Operated daily by Lufthansa (nonstop service).

Chicago-Düsseldorf: Operated daily by United (nonstop service), effective June 6, 1996.[6]

Chicago-Munich: Operated daily by Lufthansa (nonstop service).

Dallas/Fort Worth-Frankfurt: Operated daily by Lufthansa (nonstop service).

Houston-Frankfurt: Operated daily by Lufthansa (one-stop service over Dallas/Fort Worth).

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5 The predicate for our tentative approval and grant of antitrust immunity for the United-Lufthansa alliance is the existence of the expansive, new aviation agreement between the United States and Germany.

6 Official Airline Guide, Electronic Edition, April 1, 1996.

New York-Düsseldorf: Operated daily by Lufthansa (nonstop service).

New York-Frankfurt: Operated daily by Lufthansa (nonstop service).

Los Angeles-Frankfurt: Operated daily by Lufthansa (nonstop service).

Miami-Frankfurt: Operated daily by Lufthansa (nonstop service).

Newark-Frankfurt: Operated daily by Lufthansa (nonstop service).

San Francisco-Frankfurt: Operated daily by Lufthansa (nonstop service).

The joint applicants each provide competing nonstop service in two city-pair markets:

Chicago-Frankfurt.

Washington, D.C. (Dulles International Airport)-Frankfurt.

(The joint applicants also provide certain code-share operations in these two markets).

The joint applicants' current alliance agreement provides for the joint coordination of schedules, reservation systems, marketing and distribution, frequent flyer programs, and code-sharing. However, each airline independently establishes its fares and rates for flights offered to the public under its airline designator code. As a consequence, the joint applicants engage in price competition over these code-sharing routes.

II. The United and Lufthansa Expanded Alliance Agreement

The Alliance Expansion Agreement provides for the establishment of joint marketing, advertising and distribution networks; coordinated flight schedules, route networks, and route planning; revenue pooling and sharing; joint identity, including harmonization of existing identities, colors, and service marks, and the use of joint aircraft colors, uniforms, aircraft interiors, and other facilities and equipment; the harmonization of existing internal information systems, including inventory, yield management, reservations, ticketing, and distribution; standardization of contracts with suppliers, travel agents, general sales agents, and other organizations and individuals; uniform service standards; coordinated pricing and inventory control; and coordinated cargo programs. In short, the Alliance Agreement, if approved, will allow the two airlines effectively to operate much as a single firm, while retaining their individual identities regarding ownership and control.

III. The Application and Responsive Pleadings

A. The Joint Applicants' Request[7]

[7] By Order 96-3-26, issued March 13, 1996, we found that the record of this case was substantially complete, and established further procedural deadlines. We also deferred action on the joint applicants' motions for confidential treatment of certain data and documents (these motions

On February 29, 1996, United and Lufthansa filed a request seeking approval of and antitrust immunity for the Alliance Expansion Agreement, for a five-year term. Through their Alliance Agreement, the joint applicants state that they intend to broaden and deepen their cooperation in order to improve the efficiency of their coordinated services, expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. Although the joint applicants aver that they will continue to be independent companies, they state that the objective of the Alliance Agreement is to enable the airlines to plan and coordinate service over their respective route networks as if there had been an operational merger between the two companies.

The applicants assert that approval of, and antitrust immunity for, the Alliance Agreement is supported by substantial public and commercial benefits and efficiencies and by U.S. international aviation policy. They state that the alliance will create network synergies by (1) linking the U.S.-European hubs of the alliance partners, (2) producing cost efficiencies and savings through integration and coordination that can be passed on to consumers in the form of lower fares and improved service, and (3) increasing competition in the global marketplace. Conversely, they argue that denial of their requests will prevent consummation of the Alliance Agreement and thereby deny these benefits to the public. The joint applicants state that they have not integrated their operations more closely because, in the absence of immunity, such arrangements would expose United and Lufthansa to "unacceptable risks of costly and distracting private antitrust suits by competitors and other private parties."[8] Therefore, the airlines regard antitrust immunity as an essential condition precedent to implementation of the Alliance Agreement.

The applicants maintain that neither carrier can attain these public interest benefits individually, due to existing bilateral barriers and financial considerations; or through merger, because U.S. and European Union ("E.U.") laws concerning nationality and ownership effectively preclude mergers between U.S. and E.U. airlines.[9] Therefore, they state that in the absence of a merger, the joint venture planned by the Alliance Agreement requires that the applicants craft business understandings that will expose them to the risk that these coordinated activities would be challenged on antitrust grounds. The joint applicants state that the Alliance Agreement will permit them to compete more effectively against competing global alliances. They further maintain that the Alliance Agreement will

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were filed by United on February 29 and Lufthansa on March 11, 1996), while limiting access to the information to counsel and outside experts who represent interested parties in this case.

8 Joint Application, at 6.

9 The joint applicants maintain that if U.S. and E.U. aviation law permitted the two airlines to merge, their merger would comply with U.S. antitrust law. Since, the applicants assert, the proposed business relationship would essentially be an "end-to-end market extension merger" it would have a nominal impact on horizontal competition.

allow them to develop mechanisms to enhance efficiencies, reduce costs and provide better service to the traveling and shipping public by providing for: increased frequencies and enhanced on-line services; expanded access to the alliance partners' beyond/behind-gateway markets; coordinated hubs and transatlantic segments; expansion of discount fares; availability of discount seats on transatlantic segments; inventory control; reduced sales, marketing and reservations costs; and more effective equipment utilization.

The joint applicants also maintain that the grant of antitrust immunity will advance U.S. international aviation policy objectives by accelerating liberalization of the U.S.-Europe marketplace, thus achieving an important goal of the Department's "Open Skies" initiative.[10] Further, the applicants assert that the Alliance Agreement is fully consistent with the Department's policy of encouraging and facilitating the globalization and cross-networking of air transportation. They maintain that approval of the proposed Alliance Agreement coupled with antitrust immunity will foster real economic and competitive pressures in the marketplace that will accelerate reform and transform aviation policy.

The applicants hold the view that their request is warranted by foreign policy considerations, fully consistent with U.S. international aviation policy, and an envisioned outcome of the newly liberalized Open Skies aviation arrangement between Germany and the United States. United and Lufthansa contend that denial of the request for antitrust immunity might well discourage other foreign governments from negotiating Open Skies accords with the United States. The applicants assert that denial of their request for antitrust immunity would be inconsistent with the U.S. Government's commitment to open entry markets and free and fair international competition and to what they contend is the Department's assurance of comparable opportunities in exchange for open skies.

The applicants assert that the Alliance Agreement will not substantially reduce or eliminate competition between the United States and Europe. Indeed, they argue that a fully implemented Alliance Agreement will enable United and Lufthansa to increase their competitiveness, placing additional commercial pressure on rival European carriers and carrier alliances. They also maintain that almost all significant transatlantic city-pair routes

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10 The joint applicants note that with the achievement of a U.S.-Germany Open Skies aviation agreement, "the Department will soon have in place a critical mass of liberal agreements that provide U.S. carriers open access to nearly 40% of the U.S.-Europe market." Joint Application, at 6-7. They maintain that approval of the Alliance Agreement coupled with antitrust immunity will encourage foreign governments with restrictive aviation regimes to open their markets to U.S. airlines. The applicants state that the success of the Northwest-KLM alliance, coupled with the antitrust immunity afforded to the joint venture, encouraged Germany to seek a liberalized, Open-Skies aviation regime with the United States. They argue that an immunized United-Lufthansa alliance will promote further liberalization within the transatlantic marketplace.

are or can be served by multiple U.S. and / or European airlines on either a nonstop, single-plane, or one-stop on-line connecting basis.[11]

Regarding the U.S.-Germany market, the applicants state that five U.S. carriers (in addition to United) are operating nonstop service between the United States and Germany.[12] Additionally, the applicants note that various third-country airlines provide air service between the United States and Germany.[13] For these reasons, the applicants state that air service competition in the U.S.-Germany market is "far more robust than it was between the U.S. and the Netherlands at the time the Department granted antitrust immunity to KLM and Northwest."[14]

The applicants also assert that the alliance will not substantially reduce or eliminate competition on any single route. They believe that the competitive effects of the alliance will be little different than the effects the Department found with respect to the U.S.-Netherlands market when it approved the Northwest and KLM joint venture. Further, the applicants note that the Open Skies Agreements between the U.S. and Germany will assure competitive discipline by providing for open entry and pricing and service freedom. They also argue that there already exist alternative competitive services in their only two overlap markets, *i.e.*, those in which both carriers now provide nonstop schedules.[15]

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11 The applicants assert that their combined market shares are not sufficient to enable the alliance to dominate the U.S.-Europe market, or to permit it to introduce supra-competitive pricing or to reduce service below competitive levels. They state that United and Lufthansa both have modest shares of currently available transatlantic capacity. The applicants' exhibits indicate that United's share of the market for both departures and seat capacity is about 8 percent, and that Lufthansa's share of the market for both departures and seat capacity is about 6 percent. The exhibits also show that American Airlines' market share for departures is greater than the alliance carriers' (14.6%, as compared to 14.1% for the alliance); and that British Airways' market share for seat capacity is greater than the alliance carriers' (about 16%, as compared to about 13.8% for the alliance). Exhibit JA-6.

12 During 1995, American Airlines, Continental Air Lin es, Delta Air Lines, Northwest Airlines, TWA, and USAir provided scheduled combination service in the U.S.-Germany market. LTU International Airways, a second German airline, also operates U.S.-Germany nonstop service. Moreover, two other German airlines, Deutsche BA and Eurowings, provide U.S. airlines an opportunity for developing code-share operations in the U.S.-Germany market. Joint Application, at 31.

13 During 1995, Air New Zealand, Kuwait Airways, Lauda Air, LTU International, Pakistan International Airlines, and Singapore Airlines provide scheduled combination service in the U.S.-Germany market. T-100 and T-100(f) nonstop and segment data.

14 Joint Application, at 32.

15 The Chicago-Frankfurt route is served nonstop by American Airlines, which has a hub at O'Hare International Airport, and the Washington, D.C.-Frankfurt route is served nonstop by Delta Air Lines, which has its European hub at Frankfurt. The applicants also note that in the Chicago-

Finally, the joint applicants state that they do not request antitrust immunity relating to the management of their interests in the Apollo and Amadeus computer reservation systems (CRS). They state that the Alliance Agreement specifically excludes from the activities the airlines intend to coordinate " 'the management of their respective interests in the CRS systems owned and operated by Galileo International Partnership and Amadeus Global Travel Distribution, S.A.' Article 4.10."[16]

B. Responsive Pleadings

On April 3, 1996, American Airlines, Inc. (American); Delta Air Lines, Inc. (Delta); the City and County of Denver (Denver); the International Air Transport Association (IATA); Northwest Airlines, Inc. (Northwest); and Trans World Airlines, Inc. (TWA) filed answers to the application.

1. American

As an initial matter, American argues that we should not address this application until we have acted on the applications of (1) American and Canadian Airlines International, Ltd. (OST-95-792, filed November 3, 1995); and (2) Delta Air Lines, Austrian Airlines, Sabena, and Swissair (OST-95-618, filed September 8, 1995) for approval of, and antitrust immunity for, their alliance agreements.

Further, American argues that this application should be approved only after Lufthansa has agreed to discontinue certain practices that have prevented American from effectively distributing its air transportation services, including its CRS, SABRE, in Germany. American asserts that "overtly discriminatory and anticompetitive" distribution practices by airlines and travel suppliers affiliated with the Amadeus CRS[17] have been a problem for American since it began marketing SABRE in Europe.[18] American argues that absent a

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Frankfurt market, at least ten other airlines provide single-plane or on-line connecting operations, and seven airlines provide single-plane or on-line connecting service in the Washington-Frankfurt market. Joint Application at 33-34; Exhibits JA-7 and JA-8.

16 Joint Application, at 36. Both United and Lufthansa own a significant share in a CRS. United is one of the principal owners of Galileo, which operates the Apollo system in North America and the Galileo system in Europe, while Lufthansa is one of the principal owners of Amadeus. Amadeus and Galileo are the two major European CRS's. Amadeus recently acquired control of System One, a U.S. CRS . However, the applicants state that they fully intend to harmonize their various information systems, including their internal reservation systems, inventory and yield management systems, and other distribution and operational systems. *See* Joint Application at 36.

17 Amadeus is jointly owned by Air France, Continental, Iberia, and Lufthansa.

18 American asserts that Lufthansa has orchestrated an effor t that has had the effect of keeping the largest tour companies out of SABRE, and of minimizing participation in SABRE by German

resolution of these issues, it would be contrary to the public interest to approve this request.

2. Delta

Delta expressed no position on whether the United and Lufthansa Alliance Agreement meets the Department's standards for approval and grant of antitrust immunity. However, Delta argues that the public interest requires the Department "immediately" to grant approval of and immunity for the Delta, Austrian, Sabena, and Swissair Alliance Agreements.

3. The City and County of Denver

Denver filed in support of the application. Denver maintains that approval of the request will allow Denver International Airport (DIA) to increase its European service. Denver notes that United has a major hub at DIA, and that existing service at DIA to Frankfurt primarily consists of connecting flights through Chicago or Washington, D.C. The City also maintains that the proposed Alliance Agreement will expand access to the German marketplace, the largest in the European Union, and provide Denver and other "underserved cities" important opportunities to obtain new international air service.

4. IATA

IATA requests that the Department withdraw from consideration in this case the issue of whether approval of the application should affect the joint applicants' continued participation in IATA tariff coordination. IATA argues that any action in this case to deny a carrier's interline access through the Tariff Conference mechanism would be unfair to IATA, its members, and their respective governments, "and cannot be reconciled with the Department's obligation to engage in orderly decisionmaking."[19] IATA states that consideration of this issue properly resides in Docket 46928.

5. Northwest

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charter carriers. American maintains that Lufthansa has also refused to provide important functionality to SABRE (thereby limiting its range of services), thus precluding airlines other than Lufthansa and United, and CRS's other than Amadeus/START, from competing effectively in the German market.

19 Comments of IATA, at 6.

Northwest takes no position regarding the joint application, except that the Department should ensure the availability of slots for U.S. carriers at Frankfurt International Airport.[20] Northwest contends that, while the U.S. and Germany have tentatively concluded an open-skies agreement, there will not be open entry in the U.S.-Germany marketplace until existing slot constraints for U.S. carriers at Frankfurt are addressed.

6. TWA

TWA requests that the application be denied. TWA argues that, if the Department approves the joint request, it should impose certain conditions limiting the ability of the applicants to restrict their competitors from distributing their travel services and scheduling their flights to and from Germany.

TWA maintains that the applicants cannot rely on the Northwest and KLM precedent to support their request, since the Northwest and KLM alliance had less market impact than this alliance would have.[21] TWA also argues that it is not valid to judge the application under Section 7 of the Clayton Act as if it were a merger because the record provides no evidence that the airlines would merge. Moreover, TWA argues that if viewed as being tantamount to a merger, the proposed alliance would fail to meet Clayton Act standards, on the grounds that the alliance would reduce competition in three relevant markets (U.S.-Europe, U.S.-Germany, and individual city pairs). TWA argues that Herfindahl-Hirshman Index (HHI)[22] analysis creates a presumption that the proposed alliance agreement is anticompetitive.[23] TWA also contends that any HHI analysis of the Chicago-Frankfurt and

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20 Northwest states that it currently has the airport s lots it requires in Germany, but from time to time it and other airlines have had difficulty acquiring slots at certain major German airports, particularly at "slot-controlled" Frankfurt.

21 TWA asserts that the Northwest-KLM request is not comparable to the joint applicants' application, in that the Northwest-KLM alliance accounted for only 8 percent of the total U.S.-Europe seats (making them the eighth and ninth largest transatlantic carriers), while United and Lufthansa are the third and fourth largest transatlantic carriers, with a combined share of about 14 percent of all transatlantic departures and 13 percent of all transatlantic seats. Moreover, the two city pairs in which Northwest and KLM competed (Minneapolis-St. Paul-Amsterdam and Detroit-Amsterdam) were substantially smaller than the two markets in which United and Lufthansa compete on a non code-share basis (Chicago-Frankfurt and Washington-Frankfurt).

22 Department of Justice (DOJ) and Federal Trade Commissions (FTC) Horizontal Merger Guidelines, issued April 2, 1995, Section 1.5.

23 TWA maintains that the DOJ and FTC have concluded that a merger in which the post-merger HHI is above 1800, and where the merger produces an increase in the HHI of more than 50 points, raises competitive concerns regarding the merger. Where the increase exceeds 100 points, the DOJ and FTC presume that the merger will create or enhance market power. TWA's analysis indicates a current U.S.-Germany HHI of 2,262, and a post-merger HHI of 2,721 (an increase of 459).

Washington, D.C.-Frankfurt routes would demonstrate unacceptable market concentrations.

TWA disagrees with the applicants' claim that the new aviation agreement between the United States and Germany assures competitive pricing and service in the affected markets, and asserts that the existence of "an abstract legal right" does not validate the claim that entry into U.S.-Germany markets will be easy. TWA states that while the affected markets are contestable, there are significant practical barriers to entry. TWA maintains that German market dominance by Lufthansa, combined with the beyond traffic flow over its European hub, makes new entry difficult. In particular, TWA contends that Lufthansa's exercise of control over travel agents, both through its CRS dominance (in Germany, where it controls Amadeus, Lufthansa's CRS market share is 82%) and through commissions and override payments, is a serious impediment to new airlines' entry into the U.S.-Germany marketplace.

TWA recommends that, if the Department grants this request for immunity, it should impose certain conditions to improve the ability of other U.S. airlines to compete in the U.S.-Germany market. First, TWA urges that the Department should require Lufthansa and its CRS partners in START to offer full functionality through U.S. CRS's.[24] Second, TWA urges that Lufthansa should be required to make slots available, at the times requested, to U.S. airlines wanting to enter the U.S.-Germany market or expand service in the marketplace. Third, TWA contends that the Department should condition the grant of antitrust immunity on the elimination of Article 6.2 of the Alliance Agreement,[25] which TWA argues effectively bars any third carrier from participating in code-share arrangements in the U.S.-German market with either United or Lufthansa.[26]

7. Joint Applicants

On April 12, 1996, the joint applicants filed a reply. The applicants maintain that the various respondents have failed to establish any basis for disapproval of the Alliance Agreement or for denial of the request for antitrust immunity. They argue that the proposed Alliance is fully consistent with Department policy, meets all applicable legal standards, is supported by foreign policy considerations, and will produce important public benefits and substantially increase transatlantic competition.

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24 TWA is one of the U.S. airline owners of Worldspan, a U.S. CRS. Amadeus is marketed in Germany by START, which is owned by Lufthansa, Deutsche Bahn, the German national railroad, and TUI (a German tour company). TWA's answer, at 12.

25 TWA maintains that as a practical matter, the article prevents other U.S. airlines from entering into code-share arrangements with either United or Lufthansa in the U.S.-Germany market.

26 Answer of TWA, at 14.

The applicants maintain that neither American nor Delta provides any valid justification for the Department to delay action on their application. While American and Delta have advanced arguments for why their respective pending applications should be approved by the Department, the applicants argue that neither airline alleges any facts suggesting that its due process rights or any applicable statutory provision requires the Department to delay acting on this application.

The applicants argue that TWA's HHI calculations substantially overstate concentration in the U.S.-Germany market. First, the applicants state that TWA's calculations are distorted by their failure to account properly for connecting passengers over non-German and non-U.S. hubs.[27] Second, they state that TWA's calculations fail to consider the varied U.S.-Europe operations that are available or would be made available to the U.S.-Germany traveling public if United and Lufthansa attempted to raise prices or restrict capacity below competitive levels. Therefore, the applicants maintain that no reliance can be placed on these HHI calculations, since they fail to appropriately address the alliance's passenger mix.

The applicants state that TWA's allegations regarding supposed barriers to entry ignore recent carrier entry and expansion in the U.S.-Germany market, and are inconsistent with the Department's international aviation policy and marketplace realities.[28] They maintain that Open Skies accords do lead to an increase in the air services available to consumers; and that the elimination of capacity and frequency controls generates new entry and expansion, as supported by the history of deregulation of the U.S. domestic aviation market, and by the noted increase in U.S. airline services in the German market.

With regard to CRS issues, the joint applicants note that neither American nor TWA suggests that its own U.S.-Germany air travel services are not adequately and fairly distributed through the various CRS systems available in Europe. Additionally, the applicants note that "the Agreement explicitly excludes from the activities the parties intend to coordinate the management of United's and Lufthansa's interests in CRS systems." The joint applicants maintain that these CRS issues are merely attempts by American and TWA to gain competitive advantages for SABRE and Worldspan in the CRS business.

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27 The applicants argue that TWA's calculations fail to recognize United's or Lufthansa's transatlantic passenger mix. They note that Frankfurt has become a major connecting point for transatlantic passengers originating in or destined for points in Eastern Europe, the Middle East and Africa. Also, United's Chicago and Washington-Frankfurt nonstop operations provide connecting service options for passengers moving on United's route network between the United States and Asia, the South Pacific and Latin America.

28 The applicants maintain that in addition to the five U.S. airlines and five third-country airlines now offering scheduled nonstop services in the U.S.-Germany market, new and expanded operations by Continental, Delta, USAir (Newark-Düsseldorf), and World Airways will commence in the summer of 1996.

The joint applicants state that, contrary to American's view, Lufthansa has no control over the CRS affiliations of German tour companies and charter carriers; in fact, Lufthansa competes with these companies. The applicants argue that while American has been unable to secure the participation of TUI in SABRE, it offers no evidence that TUI is controlled by Lufthansa. They also note that Lufthansa participates fully in both SABRE and Worldspan. Further, they indicate that Lufthansa makes available to SABRE the "highest" degree of functionality that it makes available to any CRS, including Amadeus. Finally, in so far as the commenters wish to pursue CRS issues, the joint applicants suggest that other proceedings and forums -- under U.S. law, European Union (E.U.) law, or German law -- are available and more suitable for addressing these concerns.

The joint applicants note that neither TWA nor Northwest asserts that it has been denied slots at Frankfurt to commence or expand service there or at any other German airport. Lufthansa notes that slot allocation is conducted according to an E.U. regulation, and that Lufthansa is not allowed to transfer its slots to another airline.[29] The applicants state that any suggestion that Lufthansa could impede U.S. airlines from starting or expanding U.S.-Germany services by controlling the slot allocation process is mistaken.

The joint applicants state that, contrary to TWA's contention, Article 6.2 does not "eliminate the potential" for either Party to enter into a separate code-share arrangement with another carrier between the United States and Germany.[30] Indeed, they note that United now code shares with British Midland on the London-Frankfurt route. The applicants state that Section 6.2 only requires that each party "notify in advance and discuss with the other party any such relationship."[31]

8. American's Response to the Applicants' Joint Reply

On April 23, 1996, American filed a motion for leave to file and respond to the applicants' reply. We will grant the motion. American restates its view that the Department should not consider this application before acting on the two previously filed requests for antitrust immunity.

American also declares that, contrary to the joint applicants' view, precedent establishes that CRS access is related to American's and TWA's ability to compete with Lufthansa in the German market. American maintains that its analysis of CRS booking data for the German market demonstrates that Lufthansa receives a "disproportionate share of

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29 Lufthansa also states that any slots that it does not use must be put into a pool for allocation by an independent coordinator, who is appointed by the Federal Minister for Transport.

30 See our discussion of this issue at 30.

31 Joint Reply, at 22.

bookings through Amadeus in Germany," while American does "far worse in Amadeus than in any other CRS there."

American alleges that, contrary to Lufthansa's assertions, there exists an "intimate" and "extensive" link among Lufthansa, TUI, and other German travel suppliers, that has been instrumental in preventing SABRE from offering a competitive CRS in Germany.[32] American also claims that Lufthansa has been unwilling to make available to SABRE or Worldspan in Germany certain CRS functions that Lufthansa provides to Amadeus. These include the ability to (1) process an HON card number (Lufthansa's frequent flyer program, which provides passengers with certain special privileges), and (2) issue tickets on departure (TOD), an especially popular facility in Germany that is commonly used by business travelers.

9. Joint Applicants' Reply to American's Response

On April 30, 1996, the joint applicants filed a contingent motion for leave to file a reply to American's unauthorized response. We will grant the motion. The applicants argue that, as before, American fails to offer any valid reason for the Department to delay action on their application. The applicants also maintain that American fails to advance any "credible" evidence of anticompetitive CRS behavior by Lufthansa in Germany, or that this proceeding is an appropriate forum for addressing such issues. The applicants further argue that American fails to show that Lufthansa controls the CRS decisions of TUI or any other German travel supplier, or that Lufthansa denies certain CRS subscriber functions to SABRE.

IV. Tentative Decision

We tentatively find that the Alliance Agreement should be approved and granted antitrust immunity under sections 41308 and 41309, to the extent provided below. Our examination of the joint applicants' proposal tentatively leads us to find that the integration of the two carriers' services will enhance competition overall and allow the airlines to provide better service and enable them to operate more efficiently. We find that it is unlikely that the Alliance Expansion Agreement, subject to the conditions agreed upon by the applicants and the Department of Justice (DOJ), will substantially reduce competition in any relevant market. Finally, our approval and grant of antitrust immunity for the proposed Alliance Expansion Agreement will allow the joint applicants to maximize fully the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw

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32 American offered various data that it alleges exhibit cross-ownership between these firms.

resulting from the fundamental liberalization of air services fostered by an open aviation accord.

We note that the DOJ has raised with the applicants concerns about the potential loss of competition in some particular aspects of the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets. The carriers have agreed to conditions designed to ameliorate DOJ's concerns in this respect -- *i.e.*, the applicants have agreed to exclude coordination of specified activities relating to certain types of fares and capacity for U.S. point-of-sale local passengers flying nonstop between Chicago and Frankfurt and between Washington, D.C. and Frankfurt. We will adopt those conditions, which are set forth in Appendix A hereto. In doing so, however, we note that not all aspects of these conditions, or their scope, are necessarily determinative of our tentative decision to grant the application. Moreover, we note that the determinations of competitive impact may vary with the factual circumstances of different proposed alliances.

In addition, we will require the applicants (1) to withdraw from all International Air Transport Association (IATA) tariff conference activities relating to through prices between the United States and Germany, as well as between the United States and the homeland(s) of foreign carriers participating with U.S. carriers in other immunized alliances; (2) to file all subsidiary and subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for renewal their variously styled alliance agreement(s) in five years. We also find it in the public interest to direct Lufthansa to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).

V. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

A. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. Generally, the Department withholds antitrust immunity from agreements that do not substantially reduce or eliminate competition,[33] *unless* there is a strong showing on the record that antitrust immunity is required by the public interest, and that the parties will not proceed with the transaction absent the antitrust immunity.[34]

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33 Investigation into the Competitive Marketing of Air Transportation--Agreement Phases, Order 82-12-85, affirmed, Republic Airlines Inc. v. C.A.B., 756 F2d 1304 (8th Cir. 1985).

34 Pan American World Airways, Inc., Order 88-8-18 at 9; Investigation into the Competitive Marketing of Air Transportation--Agreement Phases, Order 82-12-85 at 124. See 14 C.F.R. 303.05(a) (contents of application for antitrust immunity).

B. Section 41309

Under 49 U.S.C. Section 41309, the Department must determine, among other things, that an intercarrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[35] The Department cannot approve an intercarrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met, and those benefits cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[36] The public benefits include international comity and foreign policy considerations.[37]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[38] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[39]

VI. Tentative Approval of the Agreement

A. Antitrust Issues

The joint applicants state that through the Alliance Agreement they intend to broaden and deepen their cooperation in order to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreement's intended commercial and business effects are equivalent to those resulting from a merger of the two airlines.[40] In

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35 Section 41309(b).

36 Section 41309(b)(1)(A) and (B).

37 Section 41309(b)(1)(A).

38 Section 41309(c)(2).

39 *Id.*

40 TWA believes that it would be inappropriate to consider the proposed alliance under the standards applicable to mergers because, they contend, the record does not show that the airlines intend to merge. Clearly, the ownership and control provisions of U.S. law and regulations inhibit U.S. and foreign airline mergers. However, it is clear from the record of this case that the joint applicants fully intend to integrate their joint operations to the fullest extent permissible under U.S. law. Therefore, we find it appropriate to base our competitive evaluation on the standard Clayton Act merger test.

determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market. Order 92-11-27 at 13.

The Clayton Act test requires the Department to consider whether the Agreement will substantially reduce competition by eliminating actual or potential competition between United and Lufthansa so that they would be able to effect supra-competitive pricing or reduce service below competitive levels. Order 92-11-27 at 13. To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Department of Justice and the Federal Trade Commission use their published merger guidelines. 57 Fed. Reg. 41552 (September 10, 1992). The Merger Guidelines' general approach is that transactions should be blocked if they are likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed merger is likely to create or enhance market power, the Department of Justice and the FTC primarily consider whether the merger would significantly increase concentration in the relevant markets, whether the merger raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

1. Global Competition

The traditional analysis for airline mergers has focused on discrete city-pair routes. Without minimizing the significance of city-pair analysis, however, we believe it also important to recognize that the rapid growth and development of global airline alliance networks requires an additional perspective on competitive impact -- the perspective of a worldwide aviation market in which travelers have multiple competing options for reaching destinations over multiple intermediate points. The pro-competitive effects of global alliances can be particularly evident in the case of the so-called “behind and beyond-gateway” markets where integrated alliances with coordinated connections, marketing, and services, can offer competition well beyond mere interlining. The competitive effect is evident, though perhaps less dramatic, in the case of services between interior U.S. cities and foreign gateways, or between U.S. gateways and interior foreign cities. Integrated alliances can, in short, offer a multitude of new on-line services to literally thousands of city-pair markets, on a global basis. Thus, a significant element in antitrust analysis is the extent to which facilitating airline integration (through antitrust immunity or otherwise) can enhance overall competitive conditions.

Our analysis indicates that the alliance for which antitrust immunity is sought here will have a substantial pro-competitive impact, bringing on-line service to over 52,000 city-pair markets with an estimated traffic of about 29 million passengers. In particular, the alliance

will significantly increase competition and service opportunities to over 12 million passengers in beyond-European gateway markets.[41] This analysis further supports the view that these alliances will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities behind major gateways. By stimulating traffic, the increased competition and service options will expand the overall international market and increase overall opportunities for the traveling public and the aviation industry. U.S. consumers and airlines should be major beneficiaries of this expansion and the associated increase in service opportunities.

With this perspective, we address below the issue of airline competition at the city-pair market level. In doing so, we note that concentration figures are not conclusive. Individual airline nonstop city-pair markets usually have high levels of concentration, since most nonstop markets are served by only a few airlines. A key consideration for determining whether the United-Lufthansa alliance (or any other airline merger or joint venture) is likely to reduce competition is potential competition, *i.e.*, whether other airlines can enter the relevant markets in response to inadequate service or supra-competitive prices. The Open Skies agreement with Germany will eliminate all governmental restrictions on entry into U.S.-Germany markets for U.S. and German airlines. The agreement will accordingly eliminate perhaps the most significant remaining barrier to entry in those markets. As a result, the relevant considerations here are whether other factors will prevent U.S. and foreign airlines from entering U.S.-Germany markets, should the applicants increase fares above, or lower service below, competitive levels.

Finally, as a general rule, airlines like other firms may engage in joint ventures and cooperative arrangements without violating the antitrust laws. The courts and the enforcement agencies have usually found that such arrangements are likely to promote economic efficiency and further competition.[42] As discussed above, that has been our experience with the Northwest-KLM alliance -- the integration of those partners' operations

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41 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines. Our decision here is based in part on statistics extracted from restricted international O&D Survey data and international T-100 and T-100(f) data reported to the Department. We have determined that the public interest warrants our use of and limited disclosure of such data in this proceeding, because the public interest in evaluating this application on the basis of this data clearly outweighs any possible competitive disadvantage U.S. carriers might face from release of the data to foreign carriers. This determination is consistent with (1) the requirements set forth in sections 19-6(b) and 19-7(e) of 14 CFR Part 241 as they pertain to international T-100/T-100(f) data and O&D data, respectively, and (2) the Department's policy statement set forth in 14 CFR section 399.100, which provides that the Department may disclose restricted O&D data consistent with its regulatory functions and responsibilities.

42 *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 295 (1985).

has increased the efficiency of their operations and made it possible for the two carriers to offer more service and lower fares.

The joint applicants primarily compete in transatlantic markets. The current code-share arrangements between the joint applicants involve fourteen gateway-to-gateway nonstop transatlantic routes, a single one-stop transatlantic route, and certain other international routes.[43] Although the applicants coordinate on a service and marketing basis, the airlines price their seats independently in competition with each other, in order to maximize their own revenue over these routes. Therefore, United and Lufthansa engage in head-to-head price competition over all these routes.

2. The Department of Justice's Examination of the Alliance

As noted above, the application by United and Lufthansa for antitrust immunity necessarily requires us to examine the alliance's potential impact on competition in all relevant markets. On such antitrust issues, we initially confer with the Department of Justice, given its experience in the enforcement of the antitrust laws. However, we have the ultimate authority to determine whether the application meets the statutory prerequisites for the grant of antitrust immunity.

The Department of Justice has examined the likely competitive impact of the proposed alliance between United and Lufthansa. That Department identified two nonstop markets -- Chicago-Frankfurt and Washington, D.C. (Dulles)-Frankfurt -- where it was concerned that competition could be reduced if United and Lufthansa were able to agree on fares and capacity for local traffic. After discussions between the Department of Justice and the applicants, the applicants have agreed to limit the scope of their requested immunity so as to exclude certain activities relating to particular fares and capacity for U.S. point-of-sale local passengers on the Chicago-Frankfurt and Washington, D.C.-Frankfurt routes.

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43 The joint applicants state that they code share on all transatlantic service s that either airline operates between the U.S. and Germany: Atlanta-Frankfurt; Boston-Frankfurt; Chicago-Munich and Frankfurt; Dallas/Fort Worth-Frankfurt; New York-Düsseldorf and Frankfurt; Newark-Frankfurt; Los Angeles-Frankfurt; San Francisco-Frankfurt; and Washington-Frankfurt. The applicants plan to commence Chicago-Düsseldorf service on June 6, 1996. The applicants also conduct one-stop, code-sharing operations between Houston and Frankfurt, via Dallas/Fort Worth. In addition, United employs its code on flights operated by Lufthansa beyond Frankfurt to eleven points in Germany and nineteen points in Europe, the Middle East and Africa (*see* Exhibit JA-3). Lufthansa employs its code on flights United operates behind United's U.S. hubs (Chicago, San Francisco and Washington, D.C.) to forty-five points in the United States and to Mexico City, Mexico (*see* Exhibit JA-4). Additionally, United employs its code on Lufthansa flights between London and Berlin, Cologne, Düsseldorf, Hamburg and Munich, which connect to United's operations to the United States. Order 96-3-37.

The conditions agreed upon by the Department of Justice and the applicants are attached as an appendix to this order. In brief, the agreement would exclude from the grant of immunity the following activities: pricing, inventory, or yield management coordination, or pooling of revenues, with respect to local U.S. point-of-sale passengers flying nonstop between Chicago and Frankfurt and between Washington, D.C. and Frankfurt, with certain exceptions. The exceptions that would be covered by antitrust immunity would be the promotion and sale of certain discounted fare products: corporate fares, consolidator and wholesaler fares, promotional fares, group fares, and fares for government traffic or other traffic that either party is prohibited by law from carrying on services operated under its own code. These exceptions are subject to limitations designed to preserve competition for local passengers. For example, coordination on certain kinds of promotional fare products would be immunized only if they are offered in at least twenty-five other city-pair markets. The applicants could also coordinate on such matters as the number of flights and aircraft types used for Chicago-Frankfurt and Washington, D.C.-Frankfurt service.

The agreement gives United and Lufthansa the right at any time within eighteen months to ask us to reexamine the need to exclude Chicago-Frankfurt and Washington, D.C.-Frankfurt local traffic from the grant of antitrust immunity in light of such factors as current competitive conditions and the potential efficiencies achievable from a further integration of the operations of United and Lufthansa in the two nonstop markets.

The applicants have adopted these limitations on the requested immunity after conferring with the DOJ, and we tentatively intend to include the agreed conditions in our proposed grant of antitrust immunity. The antitrust analysis set forth in this order therefore assumes that the immunity will exclude local traffic in the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets to the extent set forth in Appendix A.

3. Particular Markets

In addition to considerations of global airline network competition, there are four relevant markets requiring a competitive analysis: first, the U.S.-Europe market; second, the U.S.-Germany market; third, the city-pair markets; and, fourth, the behind and beyond-gateway markets.

(a) The U.S.-Europe Market

We have tentatively determined that the Alliance Agreements should not diminish competition in the U.S.-Europe marketplace, but rather will enhance it significantly. During Calendar Year 1995, our analysis shows that United's U.S.-Europe scheduled passenger share was 8 percent, and Lufthansa's scheduled passenger share was 5.8 percent (the airlines' combined share of the market was 13.9 percent). In contrast, the British Airways (15.6 percent) and USAir (1.2 percent) code-share alliance had a 16.8 percent

scheduled passenger market share; the Delta (11.4 percent), Austrian (0.5 percent), Sabena (0.8 percent), and Swissair (2.9 percent) code-share alliance had a 15.6 percent scheduled passenger market share; and the Northwest Airlines (4.3 percent) and KLM (4.5 percent) alliance had a 8.8 percent scheduled passenger market share.[44] Based on our analysis, we find that the U.S.-Europe marketplace is highly competitive, both as to nonstop and connecting service options.

(b) The U.S.-Germany Market

A second relevant market is the United States-Germany market, served through four German gateways: Düsseldorf, Munich, Frankfurt, and Berlin. In this market the joint applicants will have the largest share of the market. Nonetheless, based on our evaluation, we tentatively find that the proposed integration will not enable the joint applicants to charge supra-competitive prices or to reduce service below competitive levels.[45]

The alliance will not substantially reduce competition because competitors will have free and open access to the marketplace under the U.S.-Germany Open Skies accord. Despite the large market share held by the alliance partners in the U.S.-Germany market,[46] we see no significant barriers to entry by other U.S. airlines in that market.[47]

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44 Additionally, the U.S.-Europe scheduled passenger market share for American Airlines was about 11 percent; TWA about 5 percent; and Virgin Atlantic Airways Ltd. (Virgin Atlantic) about 5 percent. Source: T-100 and T-100(f) nonstop segment and market data.

45 Indeed, the applicants do not use Berlin as a gateway. Moreover, at two of the other German gateways, Lufthansa is not the dominant airline in the U.S. market. In the U.S.-Düsseldorf market, LTU International Airways (LTU) carried about 41 percent of the total passengers transported; Lufthansa carried about 34 percent; and American carried 25 percent. In the U.S.-Munich market, Delta carried about 67 percent; Lufthansa carried about 21 percent; and Lauda Air carried about 11 percent. Source: T-100 and T-100(f) nonstop segment and market data, Calendar Year 1995.

46 In the U.S.-Frankfurt market, Lufthansa carried about 37 percent of the total passengers transported; Delta carried about 25 percent; United carried about 8 percent; American and Northwest each carried about 7 percent; and USAir carried about 6 percent. Source: T-100 and T-100(f) nonstop segment and market data, Calendar Year 1995.

47 TWA's HHI analysis for the U.S.-Germany market does not in our view demonstrate that the alliance agreement will substantially reduce competition. First, as United and Lufthansa accurately note, a significant amount of U.S.-German traffic travels over third-country intermediate points; TWA's HHI figures for the U.S.-Germany market do not include this traffic and are therefore incomplete. Joint reply, at 7-8. In addition, as the applicants note, a certain amount of on-board U.S.-Germany traffic is actually traveling between the United States or Germany and a third country. *Id.* at 8-10. Second, we note that the recently negotiated agreement with Germany would further liberalize entry by, for example, removing the frequency caps established in the 1994 Transitional Air Services Agreement. The removal of regulatory obstacles is intended and anticipated to promote new competitive entry.

In addition to United's service, American Airlines, Continental Air Lines, Delta Air Lines, Northwest, TWA, and USAir currently conduct scheduled combination services in the U.S.-Germany market. Additionally, Air New Zealand Limited, Gulf Air, Lauda Air, LTU International, Pakistan International, and Singapore Airlines provide nonstop direct U.S.-Germany services. Of the U.S. airlines serving the German market, only TWA opposed the application, and its opposition was based largely on generic competition arguments rather than demonstrated, particularized harm.

While the United and Lufthansa alliance transported about 42 percent of the total passengers in the U.S.-Germany market during Calendar Year 1995,[48] we do not find that the alliance partners will be able to charge supra-competitive prices or reduce service below competitive levels. In 1995 three U.S. airlines accounted for about 39 percent of total passengers transported in the U.S.-Germany marketplace: Delta, about 27 percent; American, about 7 percent; and Northwest, about 5 percent. Also, as we note above, six U.S. airlines, besides United, provide nonstop service between the United States and Germany. Moreover, nonstop service is offered by a number of third-county airlines. Thus, competition in air services between the United States and Germany is vigorous, and we expect that the new expansive U.S.-Germany aviation agreement will provide an environment for further enhancing air service and price competition between the two countries.

As we have already stated, the U.S.-Germany Open Skies accord would permit any U.S. airline to serve Germany from any point in the United States. Accordingly, all U.S. airlines will have the opportunity and ability to enter the U.S.-Germany marketplace and to increase their service if the alliance partners attempt to raise prices above competitive levels (or lower the quality of service below competitive levels). As the applicants have stated, several U.S. airlines intend to enter or to expand their operations in the U.S.-Germany market this summer.[49]

Northwest and TWA argue that the lack of available slots at Frankfurt airport will impede U.S. airlines' ability to compete in the U.S.-Germany market. Certainly, the availability of slots is important to an airline's ability to compete. However, the record of this case does not indicate that the commenters have been denied slot access for new or expanded operations at Frankfurt airport. The ability of other U.S. airlines to increase service on U.S.-Frankfurt routes suggests that the slot restrictions at Frankfurt should not prevent entry.

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48 T-100 and T-100(f) nonstop segment data.

49 The applicants state that Continental, Delta, USAir and World intend to expand or introduce new service in the U.S.-Germany market this summer. They further note that Continental plans to commence new service in the Newark-Düsseldorf market in 1996 (*see* Aviation Daily, April 12, 1996, at 80). USAir commenced service in the Boston-Frankfurt and Philadelphia-Frankfurt markets in 1995, and it will commence Philadelphia-Munich service on May 23, 1996. Joint Reply, at 12-13.

Finally, as the applicants state, slot allocation at German airports is administered under a European Union regulation and Lufthansa has no legal role in determining slot availability.

(c) The City-Pair Markets

A third category of relevant market consists of the fourteen city-pair markets served by both applicants with either nonstop or single-plane flights operated under their current code-share agreement.[50] The applicants have undertaken to exclude from the scope of requested immunity capacity, fares, and yield management decisions for some category of U.S. source local passengers in the only two markets where both applicants operate their own flights, the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets.

In finding that certain aspects of the Chicago-Frankfurt and Washington, D.C.-Frankfurt nonstop markets should be excluded from the grant of antitrust immunity, the Justice Department appears to have a general concern that other airlines may be relatively unlikely to provide nonstop service on these routes, since the applicants have the competitive advantage of hubs at both ends of each route. The Justice Department appears to reason that, for certain especially time-sensitive business travelers, connecting services do not adequately discipline the fares and service offered by nonstop carriers. Leisure travelers, in contrast, are usually quite willing to take connecting services in order to obtain lower fares. Although the other hubbing carrier at Chicago, American, operates nonstop Chicago-Frankfurt flights, and Delta operates nonstop flights between Washington, D.C. and Frankfurt, the number of nonstop competitors would, at least in the short term, necessarily decline from three to two carriers. Without addressing here the DOJ views, we note simply that the applicants' agreement with the Justice Department eliminates this issue regarding competition in the nonstop markets.

There are no barriers to entry in any of the other twelve markets, and no party has argued to the contrary. The recent and planned entry by other U.S. airlines into U.S.-Germany markets confirms our tentative finding that entry is both possible and likely, notwithstanding the applicants' large market share.

The one exception raised by the commenters is TWA's assertions regarding the San Francisco-Frankfurt market. While San Francisco can be considered a United hub, San Francisco's geographical location on the Pacific coast means that the applicant's San Francisco-Frankfurt flights would not attract much traffic from behind points in the United States. As a result, United's hub at San Francisco should not deter entry by other airlines.

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50 For a significant number of travelers in long-haul markets not constrained by strict time-sensitivity, one-stop and connecting service can provide a reasonable substitute for nonstop service and should be considered as a competitive option for purposes of antitrust analysis.

(d) The Behind and Beyond-Gateway Markets[51]

As we have noted, the pro-competitive effects of global alliances can be particularly evident in the case of the behind and beyond-gateway markets where integrated alliances with coordinated connections, marketing, and services, can offer competition well beyond traditional interlining. For example, our analysis estimates that the proposed alliance will result in enhanced on-line connecting opportunities to more than 205 cities in Europe and beyond, accounting for over nineteen million passengers, or about 67 percent of the passengers who we estimate will have access to the United and Lufthansa integrated network. These markets raise no competitive concerns because there are a wide array of available alternatives for travelers over other gateways with comparable elapsed travel times. Travelers in these markets should clearly receive better service in the future as a result of this alliance.

4. CRS Ownership

However, the integration of the two carriers' operations could create a risk or reduce competition in the CRS business because of each carrier's interest in a CRS. In this regard, the applicants state that they are not requesting antitrust immunity relating to the management of their interests in the Apollo/Galileo, and Amadeus/START CRS's.[52] As noted above, United is one of Galileo's owners, and Lufthansa is one of Amadeus' owners. However, like the Northwest and KLM alliance, they fully intend to integrate their information systems, resources, and functions, including their internal reservation systems, inventory and yield management systems, and other distribution and operational systems. Therefore, consistent with our determinations in the Northwest and KLM case, we have tentatively decided to grant antitrust immunity to cover coordinating the presentation and sale of United's and Lufthansa's airline services in the Apollo/Galileo and Amadeus/START systems and other CRS's and coordinating the operations of their internal reservation systems, but not the carriers' management of their interests in Apollo/Galileo and Amadeus/START.

We tentatively find that the Agreement will substantially benefit competition, subject to the conditions stated by this order, since it will enable the joint applicants to operate more efficiently, provide the public with a wider variety of on-line services, and permit United to compete more effectively with other global alliances. Therefore, we tentatively find that the proposed Alliance Agreement will not cause a substantial reduction or elimination of competition.

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51 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines.

52 Joint Application, at 35-36.

B. Public Interest Issues

Under Section 41309 we must determine whether the Alliance Agreement would be adverse to the public interest. A similar public interest examination is required by Section 41308. Except as noted, we tentatively find that approval of the Alliance Agreement will promote the public interest.

Open Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wishes. These agreements place no limits on the number of flights that can be operated, and carriers can charge any fare unless it is disapproved by both countries.[53]

We recognize that the *ad referendum* agreement reached by the United States and the Federal Republic of Germany, which would establish an Open Skies regime between the United States and Germany, does not require us to grant a request for antitrust immunity for agreements integrating the services of United and Lufthansa. However, we have found that the Alliance Agreement is likely to benefit the traveling public in numerous markets and is unlikely to reduce competition significantly in most markets.

As enunciated in our April, 1995 U.S. International Air Transportation Policy Statement, airlines around the world are forming alliances and linking their systems to become partners in transnational networks to capture the operating efficiencies of larger networks, and to permit improved service to a wider array of city-pair markets. We are already seeing the benefits of these international alliances, and we have undertaken to facilitate them and the efficiencies they can generate, where possible to do so consistently with consumer welfare. We believe that competition between and among these global alliances is likely to play a critically important role in ensuring that consumers in this emerging environment have multiple competing options to travel where they wish as inexpensively and conveniently as possible.

In this case, having tentatively determined that the overall competitive effect of the Alliance Expansion Agreement is beneficial and consistent with our international aviation policy, we believe that the public interest favors the grant of antitrust immunity. In so stating, of course, we will continue to monitor closely the effects of an immunized alliance on consumers and on competition, to ensure that the immunized alliance continues to serve the public interest.

VII. Tentative Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that immunity is required by the public interest. As noted, we

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53 Order 92-8-13, August 5, 1992.

have established a policy of denying antitrust immunity to agreements that do not violate the antitrust laws unless the immunity is required by the public interest and the parties will not go ahead with the agreement without immunity.

United and Lufthansa have stated that they are unlikely to proceed with the Alliance Agreement without antitrust immunity. We agree. The confidential documents submitted by the applicants support this conclusion. The joint applicants maintain that the public benefits that the airlines seek to achieve through the formation of an expanded alliance cannot be accomplished absent antitrust immunity. They claim that the proposed integration of services will assuredly expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they point out that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities, including scheduling, route planning, pricing, marketing, sales, and inventory control.

Since the antitrust laws allow competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the applicants' services would be found to violate the antitrust laws.[54] However, since the applicants will be ending their competitive service in some markets, they could be exposed to liability under the antitrust laws if we did not grant immunity.[55]

To the extent discussed above, we tentatively find that antitrust immunity should be granted to the Alliance Agreement. We also intend to review and monitor the applicants' progress in implementing the Agreement, if we approve and immunize it, in order to ensure that the applicants are carrying out the Agreement's pro-competitive aims. We will also require the joint applicants to resubmit the Agreement for review in five years, if we make final this tentative decision to approve and immunize it.

While we tentatively conclude that the alliance should be approved and given immunity, we find, as discussed next, that certain conditions appear necessary to allow us to find that approval and immunity are in the public interest. We further find that several conditions suggested by the commenters appear to be unnecessary.

VIII. IATA Tariff Coordination Issue

We have tentatively decided to condition our grant of antitrust immunity to the Alliance upon the withdrawal by the joint applicants from IATA tariff coordination activities affecting through prices between the U.S. and Germany and between the U.S. and any

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54 Cooperative arrangements between airlines are today commonplace. We are unaware of any holding that such arrangements violate the antitrust laws. Order 92-11-27 at 19.

55 Cf. pp 19-20 *supra.*

other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity by us.[56] Under this condition, the Alliance carriers may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Germany and between the United States and the homeland(s) of their similarly-immunized alliance competitors. Through prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, tentatively would not be covered by the condition.[57]

We tentatively find that this condition is in the public interest for a number of reasons. The immunity requested in this proceeding includes broad coverage of price coordination activities between the joint applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we tentatively find supports immunity for the proposed Alliance activities is the potential for increased price competition between the Alliance carriers and other carriers, particularly other international alliances. We tentatively believe that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Alliance carriers to continue tariff coordination within IATA undermines such competition.

The Department recognizes that a more extensive withdrawal of the Alliance carriers from IATA coordination activities might be justified on economic grounds. Indeed, in Order 85-5-32, issued May 6, 1985, the Department found IATA tariff coordination to be anticompetitive, but nevertheless approved and immunized it on a worldwide basis on foreign policy and comity grounds. Such issues would need to be reviewed further before expanding the scope of the IATA withdrawal condition.

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56 As noted above, this condition tentatively would include coordination on prices between the U.S. and the Netherlands by virtue of the immunity previously granted to the Northwest-KLM Commercial Cooperation and Integration Agreement by Order 93-1-11 in Dockets 48342 and 46371. Although that grant of immunity did not contain a similar condition, it will be subject to review by the Department in early 1998. In the interim, Northwest and KLM have notified the Department by a May 8, 1996, letter included in this docket that they will accept and immediately implement the condition imposed on the joint applicants in this proceeding with respect to withdrawal from IATA tariff coordination activities.

57 Under this condition, the Alliance carriers could not participate in IATA discussions of the total ("through") price (*See* 14 CFR § 221.4) between a U.S. point of origin or destination and an origin or destination in Germany, the Netherlands, or a homeland of a subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

We are tentatively not persuaded by IATA's arguments in this proceeding that we should consider any limitation on participation by carriers in IATA tariff coordination only in the context of its application for continued approval of and antitrust immunity for its Tariff Conference procedures in Docket 46928. Our condition is limited to prices between the United States and countries which have accepted the concept of competitive pricing and for whom the grant of alliance immunity is a reasonable substitute for IATA tariff conference participation, so long as competing immunized alliances are placed on an equal footing. Moreover, we tentatively find no basis for IATA's assertion that our condition would deprive other carriers of their ability to participate in the interline system. Participation in interline agreements, including the Standard Interline Traffic Agreement, is not a Tariff Conference function; participation in the agreements is not dependent on IATA membership or participation; and they would not be affected by our condition.

IX. O&D Survey Data Reporting Requirement[58]

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for three large alliances, and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100(f) data for on-flight markets. Such passengers account for a substantial portion of all traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make.

In addition to the added importance of our decision-making regarding international issues, we must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. We have therefore tentatively decided to require Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).[59]

X. CRS Participation Issue

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58 We intend to provide confidentiality protection for this data, as we do for international data submitted by U.S. airlines. As we intend to use this data for internal monitoring purposes, we do not intend to disclose the foreign carrier data to any other airlines, to avoid competitive concerns.

59 We intend to request other foreign carrier members of immunized international alliances involving U.S. carriers to submit O&D Survey data and we intend to condition any further grants or renewals of antitrust immunity on provision of such data.

We recognize that the refusal of some major German travel suppliers to participate fully in U.S. CRS's could undermine the systems' ability to compete successfully for German travel agency subscribers. This in turn could injure the ability of the systems' U.S. airline owners to compete in the U.S.-Germany air transportation market. We are prepared to take action against foreign airlines that are affiliated with a CRS and refuse to participate in a competing U.S. system at an adequate level, thereby denying the U.S. system and its affiliated airline a reasonable opportunity to market its services in travel agencies in the foreign airline's homeland. Order 88-7-11 (July 8, 1988).

The applicants, however, argue that Lufthansa itself has not refused to participate in SABRE at a high level. They allege that Lufthansa is not participating in some SABRE features because SABRE has not begun offering them in Germany and that Lufthansa plans to participate in those features when they become available. They further assert that Lufthansa cannot control the CRS decisions of the German tour companies and other travel firms that, according to American and TWA, unreasonably refuse to participate in SABRE and Worldspan.

While the United States Government continues to be concerned with conduct by foreign firms that denies U.S. systems a fair chance to compete, we have tentatively concluded that the difficulties alleged by American and TWA do not warrant our imposing a condition on the antitrust immunity requested by United and Lufthansa. Lufthansa itself denies that it is limiting its participation in SABRE. The other alleged refusals to fully participate in SABRE and Worldspan cited by American and TWA involve firms that may be affiliated with Lufthansa but are not controlled by it, and the refusals are independent of the proposed alliance between United and Lufthansa. In contrast to our proposed condition on the applicants' participation in IATA, we do not see enough of a connection between the affiliates' decisions on participation in U.S. CRS's and the grant of antitrust immunity to justify imposing a condition here. More importantly, we believe that other fora are more appropriate for addressing these concerns. We will take appropriate action to protect the rights of U.S. airlines to market their systems in foreign countries, as we have on past complaints by American and Worldspan, but this proceeding is not the proper place for us to take action.

XI. Article 6.2 of the Alliance Agreement

TWA asserts that Article 6.2 of the Agreement bars its ability to code share in the U.S.-Germany market with either United or Lufthansa and will therefore reduce competition. Article 6.2 of the Agreement provides that "[e]ach party shall notify the other Party in advance and shall discuss with the other Party, ... any Cooperative Agreement which it proposes to enter into with any third party Air Carrier, or any significant extension or amendment which it proposes to make to any existing Cooperative Agreement with any third party Air Carrier, following the Effective Date. In order to maximize synergies and enhance customer service, the Parties shall seek to have alliances with the same third party Air Carriers, where feasible."

We disagree with TWA's assertion that Article 6.2 bars its ability to code share in the U.S.-Germany market. The provisions of this section do not bar third-party agreements, but merely provide that neither Party may enter into a third-party agreement with any other airline without prior notice to and discussion with the other Party. Indeed, we note that United currently provides daily nonstop code-share service with British Midland on the London-Frankfurt route. Furthermore, cooperative marketing arrangements such as blocked-space, code-sharing, or leasing arrangements are provided for under the 1994 Transitional Air Services Agreement between the United States and Germany, and the February 29, 1996, U.S.-Germany Protocol.

XII. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreement could raise significant consumer issues and "holding out" questions, if the joint applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act unless the airlines give reasonable and timely notice of its existence.[60]

XIII. Summary

We tentatively conclude that granting the application for approval and antitrust immunity for the Alliance Expansion Agreement will benefit the public interest by enhancing service options available to travelers, benefit U.S. consumers, and encouraging a further liberalization of the transatlantic and global marketplace. We believe that the Alliance Agreement will strengthen competition in the markets that the applicants serve, since it will enable them to offer better service and to operate more efficiently. Furthermore, we expect that the Alliance Agreement and the proposed integration of the airlines operations will strengthen United's ability to compete effectively against existing alliances and the other major European airlines.

We tentatively conclude that our grant of approval and antitrust immunity to the Alliance Expansion Agreement should be conditioned, as set forth in this order. We also tentatively direct United and Lufthansa to resubmit the pertinent Alliance Agreement five years from the date of the issuance of the final order in this case. However, the Department is not authorizing the joint applicants to operate under a common name. If the joint applicants wish to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

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60 *See* 14 C.F.R. 399.88.

In addition, we tentatively limit and condition, as delineated in Appendix A to this order, the joint applicants' request regarding their proposed integration of services and operations between Chicago, Illinois, and Washington, D.C. and Frankfurt, Germany. We also tentatively direct the joint applicants to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also tentatively direct Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).

ACCORDINGLY:

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval and antitrust immunity to the Alliance Agreement between United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines, subject to the provisions that the antitrust immunity will not cover any activities of United and Lufthansa as owners of Apollo/Galileo and Amadeus/START computer reservations systems businesses, and subject to the proposed limits and conditions indicated in Appendix A;

2. We tentatively direct United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines to resubmit their Alliance Agreement five years from the date of issuance of the final order in this case;

3. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require United Air Lines, Inc. and Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department;

4. We tentatively direct Deutsche Lufthansa, A.G. d/b/a Lufthansa German Airlines to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner United Air Lines, Inc.);

5. We direct interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of the order described in ordering paragraphs 1-4 to file an original and five copies in Docket OST-96-1116, and serve on all persons on the service list in that docket, a statement of such objections or comments, together with any supporting evidence the commenter wishes the Department to notice, **by 10:00 a.m. Thursday, May 16, 1996. Answers to objections shall be due no later than 10:00 a.m. Monday, May 20, 1996**;[61]

6. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived;

7. We grant the American, Lufthansa and United motions to file unauthorized documents; and

8. We shall serve this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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61 Because of the expedited schedule of this proceeding, service should be by hand delivery or FAX. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

An electronic version of this document
will be made available on the World Wide Web at:
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PROPOSED CONDITIONS
GOVERNING THE ANTITRUST IMMUNITY FOR THE
ALLIANCE EXPANSION AGREEMENT BETWEEN
UNITED AIR LINES, INC. AND DEUTSCHE LUFTHANSA A.G.

Grant of immunity

The Department grants immunity from the antitrust laws to United Air Lines, Inc. and Deutsche Lufthansa A.G., and their affiliates, for the Alliance Expansion Agreement dated January 9, 1996, between United Air Lines, Inc. and Deutsche Lufthansa A.G. and for any agreement incorporated in or pursuant to the Alliance Expansion Agreement.

Limitations on immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or yield management coordination, or pooling of revenues, with respect to local U.S.-point-of-sale passengers flying nonstop between Chicago/Frankfurt and Washington/Frankfurt, or provision by one party to the other of more information concerning current or prospective fares or seat availability for such passengers than it makes available to airlines and travel agents generally.

Exceptions to limitations on immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion or sale by the parties of the following discounted fare products with respect to local U.S.-point -of-sale passengers flying nonstop between Chicago/Frankfurt and Washington/Frankfurt: corporate fare products; consolidator/wholesaler fare products; promotional fare products; group fare products; and fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code. For immunity to apply, however: (i) in the case of corporate fare products and group fare products, local U.S. point-of-sale non-stop Chicago/Frankfurt and Washington/Frankfurt traffic shall constitute no more than 25% of a corporation's or group's anticipated travel (measured in flight segments) under its contract with United and Lufthansa; and (ii) in the case of consolidator/wholesaler fare products and promotional fare products, the fare products must include similar types of fares for travel in at least 25 city-pairs in addition to Chicago/Frankfurt and/or Washington/Frankfurt.

Definitions for purposes of this Order

"Corporate fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published fares, not prices, volume discounts, or other forms of discount.

"Consolidator/wholesaler fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices to (i) consolidators for sale by such consolidators to members of the general public either directly, or through travel agents or other intermediaries, at prices to be decided by the consolidator, or (ii) wholesalers for sale by such wholesalers as part of tour packages in which air travel is bundled with other travel products, which discounts, in either case, may be stated either as net prices due the parties on sales by such consolidator or wholesaler, or as percentage commissions due the consolidator or wholesaler on such sales.

"Promotional fare products" means published fares that offer directly to the general public for a limited time discounts from previously published fares having similar travel restrictions.

"Group fare products" means the offer of non-published fares at discounts from the otherwise applicable tariff prices for the members of an organization or group to travel from multiple origination points to a single destination to attend an identified special event, which discounts may be stated either as percentage discounts from specified published fares or net prices.

Clarification of scope of limitation on immunity

Under no circumstances shall the limitations on antitrus t immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Expansion Agreement other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number frequencies and types of aircraft to operate on the Chicago/Frankfurt and Washington/Frankfurt routes, and the configuration of such air-craft; coordination of pricing, inventory and yield management, and pooling of revenues, with respect to non-local passengers traveling on nonstop flights on the Chicago/Frankfurt and Washington/Frankfurt routes; and the provision by one party to the other of access to its internal reservations system to the extent necessary for use exclusively in checking-in passengers or making sales to or reservations for the general public at ticketing or reservations facilities.

Review of limitations on immunity

Within eighteen months from the date that this Order becom es final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Chicago/Frankfurt and Washington/Frankfurt city pairs; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.